Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930

[redacted], et al.,

Appellants,

vs.

[redacted], Trustee in Bankruptcy, etc., et al.,

Appellees.

No. 14931

WILLIAM C. PEARSON, Bankrupt,

Appellant,

vs.

GEORGE T. DOGGIN, as Trustee in Bankruptcy, etc., et al.,

Appellees.

No. 14932

WILLIAM C. PEARSON, Bankrupt,

Appellant,

vs.

GEORGE T. DOGGIN, as Trustee in Bankruptcy, etc., et al.,

Appellees.

Appeals from the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

[redacted] Taylor,
[redacted] Sasson,
215 West Seventh Street,
Los Angeles 14, California,

[redacted] Dahlstrom,
Suite 920, 734 South Sterling Street,
Los Angeles 48, California,

Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

STATUTES

TEXTBOOKS

Nos. 14930-31-32

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14930

RAMESON BROTHERS, etc., *et al.*,

Appellants,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy, etc., *et al,*

Appellees.

No. 14931

FREDERICK M. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.,*

Appellees.

No. 14932

WILLIAM W. RAMESON, Bankrupt,

Appellant,

vs.

GEORGE T. GOGGIN, as Trustee in Bankruptcy, etc., *et al.,*

Appellees.

Appeals from the United States District Court for the Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

Jurisdictional Statement.

Creditors' petitions in involuntary bankruptcy were filed in the United States District Court for the Southern District of California containing the usual jurisdictional allegations required by Title 11, U. S. C. A., Secs. 11 and 12. The petition against Rameson Brothers, a co-partnership, appellant in case No. 14930, was filed on October 7, 1952. [Tr. p. 3.] The petitions against Frederick M.

Rameson and William W. Rameson, the members of the co-partnership, appellants in cases Nos. 14931 and 14932, respectively, were filed on October 23, 1952. [Tr. pp. 49 and 52.]

Orders of General Reference to the Honorable Hugh L. Dickson, one of the referees in bankruptcy for said district court, were made and entered on the same dates the respective petitions were filed, pursuant to Title 11, U. S. C. A., Sec. 66. [Tr. pp. 6 and 56.]

The partnership was adjudicated a bankrupt by said Referee on October 17, 1952 [Tr. p. 8] and the individual partners on November 3, 1952. [Tr. p. 56.]

On September 15, 1954 the said Referee in Bankruptcy made and filed Findings of Fact and Conclusions of Law [Tr. pp. 23-25 and 71-73] and Orders Denying Discharge as to each of the appellants. [Tr. pp. 25, 73.]

On September 22, 1954 each of the appellants herein filed a Petition for Review of the Referee's Order denying them a discharge as provided in Title 11, U. S. C. A. Sec. 67(c). [Tr. pp. 26-29, 74-80.]

On June 14, 1955 the District Court filed a Memorandum affirming the order of the referee and directed the preparation of formal orders. [Tr. 32 and 80.]

On July 13, 1955 the District Court filed and on July 14, 1955 the Clerk of said court entered Orders Affirming Referee's Orders denying each of the appellants a discharge. [Tr. 33, 83, 84.]

The following day, July 15, 1955, Notices of Appeal were filed by each of the appellants pursuant to Title 11, U. S. C. A. Sec. 48. [Tr. pp. 33, 83, 84.]

The United States District Court for the Southern District of California had jurisdiction of these cases by virtue of the provisions of Title 11, U. S. C. A. Sec. 11. This Honorable Court has juridiction of these appeals as provided in Title 11, U. S. C. A., Secs. 47 and 48.

Statement of the Case.

Creditors' involuntary petitions in bankruptcy were filed against each of the appellants and adjudications of bankruptcy were duly made by the Referee in Bankruptcy. [Tr. p. 8 and 56.]

On February 3, 1953 the said Referee in Bankruptcy made and filed an Order Fixing Time for Filing Objections to Discharge in which March 17, 1953 was fixed as the last day for the filing of objections. [Tr. pp. 11, 60.]

Sol Jarmulowsky, a creditor, filed Specifications of Objections to Discharge of the partnership on March 17, 1953 asserting that said bankrupt had failed to keep proper records, and books of account from which its financial condition and business transactions might be ascertained.

The Trustee in Bankruptcy, in each of the three cases, filed Petitions for extension of time to file objections to discharge and on March 13, 1953, May 13, 1953, July 15, 1953 and September 15, 1953 the referee in bankruptcy made orders extending the time to and including October 15, 1953 within which said trustee might file objections to discharge.

On October 15, 1953 the Trustee in Bankruptcy again presented a Petition for Extension of Time to Object to Discharge. In the partnership proceedings the Referee in Bankruptcy did not sign the order. [Tr. p. 18.] However the record shows that another Referee signed the orders in the individual cases. [Tr. p. 67.]

On November 17, 1953 the trustee filed Specifications of Objections to Discharge in each of the three cases asserting failure to explain satisfactorily the deficiency of assets to meet the liabilities. [Tr. pp. 19, 68.]

A hearing was held on the objections to discharge on August 31, 1954 [Tr. pp. 163 *et seq.*] at which time the Trustee attempted to "*substitute in* and adopt and prosecute the objection as made on behalf of Jarmulowsky."

The Referee in Bankruptcy made Findings of Fact and Conclusions of Law in each of the three cases in which he found that all of the objections were true as to each of the bankrupts [Tr. pp. 23, 71]and filed Orders Denying Discharges on September 15, 1954. [Tr. pp. 25, 73.]

Each of the appellants filed a Petition for Review of the Referee's Order on September 12, 1954. [Tr. pp. 26, 74.] The District Court filed a Memorandum on June 14, 1955 affirming the order of the referee and directing the Trustee to submit the appropriate orders of affirmance [Tr. pp. 32, 80] and on July 13, 1955 the court filed formal Order Affirming Referee's Order in each of the cases [Tr. pp. 32, 81] which orders were entered by the Clerk on July 14, 1955. [Tr. pp. 33, 82.]

Preliminary Statement as to Consolidation.

Separate Notices of Appeal were filed by each of the bankrupts on July 15, 1955 from both the Memorandum and the formal Order Affirming Referee's Order. [Tr. pp. 33, 83.]

In each of these matters now on appeal a written memorandum order was signed and filed prior to the entering

of a formal Order approving Referee's Orders, and appeals were taken from both on the possibility that such Memorandum order might be considered to be a final order. Also in each of these matters orders made were of similar content as in each other matter. Therefor, for brevity, whenever an order is mentioned, reference is intended to be made to all orders entered in every matter, unless otherwise specified.

Questions Involved and Presented.

1. Were the Trustee's Specifications of Objections to discharge of Rameson Bros., a co-partnership, and William W. Rameson barred as not filed within the statutory time limit?

2. Was it proper for the Referee to make findings and conclusions and the Referee and the Court to make and enter an Order denying discharge of Frederick M. Rameson and William W. Rameson based on Sec. 14-C, Subd. 2, of Bankruptcy Act when no specifications of objections were filed thereon against them?

3. Was there insufficient evidence to support the Orders denying discharge by the Referee and the Court and the findings and conclusions thereof, and did such findings support the conclusions and orders; and were such findings based on material evidence?

4. Did the Specifications of Objections filed state facts sufficient to constitute ground of objection to discharge?

5. Are the Orders denying discharge erroneous in that the judge on affirming the Referee's Orders failed to set forth Findings of Facts and Conclusions of Law?

Specification of Errors.

I.

There was insufficient evidence to support the Referee's Findings of Fact, Conclusions of Law, and Order Denying Discharge.

II.

The Findings of Fact of the Referee do not support his Conclusions of Law or Order Denying Discharge in that there was material variance between the findings and the specifications alleged and in that the findings merely described normal bookkeeping practices and did not support a *prima facie* case.

III.

There was insufficient evidence to support the Court's order denying discharge and also its Findings of Fact and Conclusions of Law if it be deemed the Court adopted those of the Referee, nor do such findings and conclusions support the Court's order denying discharge.

IV.

The order Denying Discharge by the Referee and by the Court erroneously assumed adoption of Specification of Objections by the Trustee of those filed by Sol Jarmulowsky after the time for filing had expired and when same constituted a new cause of action.

V.

The orders denying discharge by the Referee and by the Court were erroneous as to Frederick M. Rameson and as to William W. Rameson in that findings and con-

clusions were made and order made and entered under Sec. 14-C, subd. 2, of the Bankruptcy Act, pertaining to books and records, when in fact no Specifications of Objection had been filed against either of such individuals.

VI.

The Specifications of Objections filed did not state facts sufficient to constitute a ground of objection.

VII.

The Specification of Objections by the Trustee to the discharge of Rameson Bros., a co-partnership, was filed after time had expired within which to file such Specification of Objections.

VIII.

The Specification of Objections by the Trustee to the discharge of William W. Rameson was filed after time had expired within which to file such Specification of Objections.

IX.

The orders of the Referee and of the Court were erroneous in that immaterial evidence was admitted and the findings were based on such immaterial evidence.

ARGUMENT.

I.

Were the Trustee's Specifications of Objections to Discharge Barred as not Having Been Filed Within the Statutory Time?

On February 3, 1953, the Referee fixed the time for filing objections to discharge as required by the Bankruptcy Act giving all interested parties until March 17, 1953 within which to file their objections. [Tr. pp. 11, 60.]

On March 17, 1953, Sol Jarmulowsky, who alleges to be a creditor, filed Specifications of Objections to Discharge *in the partnership proceeding* charging failure "to keep proper records, books of account and records" basing his objection upon Section 14-c(2) of the Bankruptcy Act. [Tr. p. 21.]

The Trustee did not file objections to the discharge but on March 13, May 13, July 15 and September 15, 1953 obtained orders extending the time for filing his objections asserting that he had not completed his examination into the acts of the bankrupt relative to same. The last order on September 15th extended the time to and including October 15, 1953 within which the trustee might file objections to discharge.

Under date of October 15th the Trustee again presented a petition for further extension of time but the record discloses that *the order submitted was not signed by the referee.* [Tr. pp. 17-18.]

On November 17, 1953 the Trustee filed Specification of Objections to Discharge in the partnership proceeding asserting that the bankrupt had failed to satisfactorily explain the deficiency of its assets to meet its liabilities under Section 14-c(7) of the Act.

The courts have consistently held that any extension of time must be obtained before the expiration of that originally fixed as the court is without power to grant an extension after the time has expired.

See:

In re Levin (C. A. Mass.), 176 Fed. 177;

In re Brecher (C. A. N. Y.), 4 F. 2d 1001;

Rerat v. Fisk Tire Inc. (C. A. Minn.), 28 F. 2d 607;

In Re Kuhne, 18 Fed. Supp. 985;

In re Reigel, 21 Fed. Supp. 565.

Wherefore, appellants contend that in the partnership proceeding the referee was without jurisdiction to consider the Trustee's objections as they were filed more than a month after the expiration of the last order extending the time for filing of objections.

It is so fundamental that the question of jurisdiction is always before the Federal Courts that no citation of authorities is necessary to this Honorable Court.

Turning now to the individual proceedings the record discloses that an order was signed on October 15th by a different referee than the one to whom the case was regularly assigned extending the time for objections by

the trustee to November 17, 1953. [Tr. pp. 66-67.] However, an examination of the original papers in the certified record will disclose that such order was signed on October 15th in only the Frederick M. Rameson proceeding and not until October 16th in the William W. Rameson proceeding. Apparently the printer did not notice this difference at the time the record was printed.

It therefore appears that in only the Frederick M. Rameson proceeding did the Referee have jurisdiction to consider the Trustee's objections as such objections were not timely filed in the other proceedings.

The objections of Sol Jarmulowsky was only filed in the partnership proceeding. However, at the time of the hearing on the objections the following appears in the record:

> "Mr. Stockman: The Trustee would like to substitute in and adopt and prosecute the objection as made on behalf of Jarmulowsky. Mr. Cooper is here from that office. It is quite satisfactory that we prove up this objection.
>
> The Referee: Let's go ahead."

The Referee proceeded to make findings of fact and conclusions of law in all three of the proceedings sustaining both the objections of the Trustee and Jarmulowsky in all of them. The objections of Jarmulowsky were never filed in the individual proceedings and should not have been considered in those proceedings.

Defective specifications may be amended, in the discretion of the court, to correct or amplify them, but not to set up new matter and not to add a new ground of objection after the time for filing specifications has expired.

See:

In re Weston (C. A. N. Y.), 206 Fed. 281;

In re Hanna (C. A. N. Y.), 168 Fed. 238;

Northeastern Real Estate Securities Corp. v. Goldstein (C. A. N. Y.), 91 F. 2d 942;

In re Taub (C. A. N. Y.), 98 F. 2d 81;

Schlesinger v. Phillips (C. A. Tex.), 36 F. 2d 181;

In re Biro (C. A. N. Y.), 107 F. 2d 386.

To allow the prosecution of the Jarmulowsky objections in the individual proceedings permits the Trustee to make objections months after the time had expired.

See:

Richey v. Ashton (C. A. Cal.), 143 F. 2d 442;

In re Manasse (C. A. Ill.), 125 F. 2d 647.

So we find the untenable situation of having Jarmulowsky's objections timely filed in the partnership proceedings, substituted in and adopted by the Trustee, and the Trustee's objections timely filed in the Frederick Rameson proceeding which could properly be considered by the Referee but with findings of fact and conclusions of law in all of the proceedings finding all of the objections good as to all of the bankrupts.

The cases should be reversed and remanded to the referee for findings on the valid objections after a proper hearing limited to the issues raised on those objections.

II.

Was It Proper for the Referee to Make Findings of Fact and Conclusions of Law and Order Denying Discharges in the Individual Proceedings Based Upon Section 14-c(2) of the Act When no Specifications of Objections Based Thereon Were Filed Against Them?

The argument and authorities under the previous point are equally applicable here. The Jarmulowsky objections in the partnership proceeding were adopted by the Trustee. However, the Trustee did not ask that those objections be considered in the individuals' proceedings.

To have attempted to do so would have permitted new and additional grounds long after the time for filing objections had expired which cannot be done under the law.

Northeastern Real Estate Securities Corp. v. Goldstein (C. A. N. Y.), 91 F. 2d 942;

Richey v. Ashton (C. A. Cal.), 143 F. 2d 442;

Lerner v. First Wisconsin Nat. Bank, 294 U. S. 116, 79 L. Ed. 796, 55 S. Ct. 360;

In re Zaffer (C. A. N. Y.), 211 Fed. 936.

When a court makes findings of fact upon issues not raised in the proceeding before it and bases a judgment thereon the case must be reversed for a new trial on the issues property before the court.

True, Findings of Fact should not be set aside unless clearly erroneous. (Rule 52, Federal Rules of Civil Procedure.)

Even the Supreme Court must on appeal correct clear error even in findings of fact.

United States v. Yellow Cab Co., 338 U. S. 338, 94 L. Ed. ....., 70 S. Ct. 177;

United States v. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. 92, 68 S. Ct. 525.

The courts of appeal should examine the findings of both the district court or referee for clear error.

Smith v. Federal Land Bank of Berkeley (C. C. A. 9), 150 F. 2d 318;

Earhart v. Callan (C. A. 9), 221 F. 2d 160;

Smyth v. Erickson (C. A. 9), 221 F. 2d 1.

Findings of fact which are induced by an erroneous view of the law are not binding on the court of appeals.

Galens Oaks Corp. v. Scofield (C. A. Tex.), 218 F. 2d 217;

Owen v. Commercial Union Fire Ins. Co. of N. Y. (C. A. Md.), 211 F. 2d 488;

Bjornson v. Alaska S. S. Co. (C. A. 9), 193 F. 2d 433;

United States v. El-O-Pathic Pharmacy (C. A. 9), 192 F. 2d 62.

In these appeals we find that the referee made findings of fact on issues which were not properly before him. He found the Trustee's Objections to Discharge sustainable in the partnership proceeding which objections had been filed after the time for filing objections had expired. He found the Creditor's objections true in the individual proceedings when those objections had never been filed in the individual proceedings.

All of these findings are clearly erroneous and the judgment based thereon should be reversed.

III.

Was There Insufficient Evidence to Support Orders by Court and Referee and Findings and Conclusions in Support Thereof, and Did Such Findings Support the Conclusions and Orders, and Were Such Findings Based on Material Evidence?

The burden of proof on objection to discharge is primarily on the objector as he must show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed an act which would prevent his discharge in bankruptcy. It essentially requires *prima facie* proof of the specifications. (*Remington on Bankruptcy* (6th Ed.), Vol. 7, p. 351.) If such a *prima facie* case is proved, the burden of proving he has not committed such an act shall be upon the bankrupt. (Bankrutcy Act. Sec. 14-C, as amended in 1926.)

Books and Records.

Sec. 14-C, subd. 2, of the Bankruptcy Act provides:

> "c. The Court shall grant the discharge unless satisfied that the bankrupt has . . .
>
> "2. destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the Court deems such acts or failure to have been justified under all of the circumstances of the case. . . ."

This Honorable Court in the case of *Burchett v. Myers,* 202 F. 2d 920, 927, set forth the rule that the requirement under this section is in the alternative; that either books or records are sufficient so long as they make it possible to ascertain the financial condition and business transactions of the bankrupt.

The evidence produced by the testimony of the objector's own witness proved that bankrupts kept such books and records.

F. N. Johnson, a licensed public accountant was called as an expert witness. [Tr. p. 183.] He testified [Tr. p. 185] that the accounting system was adequate if properly maintained by posting accounts up to date and that then bankrupt could ascertain financial condition. He further testified [Tr. pp. 188-189] that there were records as to individual houses but that in working for the trustee he didn't use those figures, and said: "I built my own figures on it." We submit that it is quite significant that no testimony was given that the financial condition could *not* be ascertained from both the books and records, nor was there testimony that such was not done or not done due to difficulty. The attorney for the trustee stated in his opening argument that to find the true condition of the business—"It took a lot of work and a lot of time." [Tr. p. 166.] One test under this section is whether a competent accountant could ascertain the debtor's financial condition. (See *In re Frey,* 9 Fed. 376; *In re Graves,* 24 Fed. 550; *In Re Arnold,* 1 Fed. Supp. 499; *Burchett v. Myers,* 202 F. 2d 920.) No testimony was given that such could not be done. In fact the trustee's attorney indicated in his opening statement that such was done, though with difficulty.

Jack Conrad, former bookkeeper of the business was called as a witness by objectors. [Tr. p. 169.] He testified as to many matters upon which the Referee's findings were based. Checks were drawn in advance [Tr. p. 170]; bills were marked and posted as paid at the time checks were drawn and before the checks cleared [Tr. p. 171];

sometimes the payee was asked to hold a check until further word. [Tr. pp. 171-172.] The Referee's Findings 1 to 5. [Tr. pp. 23-24, 72.]

However, he testified further. The bankrupt's cardex system which was posted through a Burroughs Sensomatic was a common and regular way of keeping books [Tr. pp. 170-171]; that checks were made out for the convenience of the girls working under him when they had time, *and were left in the book* (emphasis ours) [Tr. p. 178]; checks were not handed out until they were to be paid [Tr. p. 178]; and *that such was common in bookkeeping* (emphasis ours) [Tr. p. 178]; offsetting entries were made reducing payables when checks were made as a bookkeeping procedure. [Tr. p. 180.]

It is submitted that the Referee's Findings 1 to 5 [Tr. pp. 23-24, 72], in no way tend to uphold his Conclusions of Law nor his Order as such were normal bookkeeping practice and also if both cash and payables were reduced on the books the financial condition would not be changed and net surplus or deficit, as the case might be, would remain exactly the same after a check was written as it was before the check was written.

The Referee's Finding 6 [Tr. pp. 24, 72], as to lack of posting prior to the time of the bankruptcy must be considered in the light of the rule previously discussed that books or records and not just books alone are to be considered. *In re McNab,* 58 Fed. Supp. 960, points out that the Court can take judicial notice that a bankrupt's books almost invariably lag as to posting when an insolvent and bankrupt condition exists, and that such a lag in posting must have continued for a substantial portion of the bankrupt's business career.

The Referee's Finding 7 [Tr. pp. 24, 72], states that the books and records did not truly reflect its financial conditions and business transactions as bills and invoices were marked paid before actual payment and as the firm was behind in posting entries in its books and records. This conclusion we submit is contrary to the evidence as heretofore discussed. Also we believe that the wording of this finding as to the firm being behind in "posting entries in its books of account or records" indicates that the Referee did not give consideration to the word "records" as used in the statute. Records must mean subsidiary instruments to the formal books, else there would be no distinction. Posting might involve posting from records to books, but could not involve posting to records. Conclusions of Law based on failure to keep books and records so as to be able to ascertain financial condition and business transactions, and order thereon, are erroneous when the terms "books of account" and "records" as used in the statute are not accorded separate dignity. See:

Burchett v. Myers, 202 F. 2d 920, 927.

We believe that this matter meets the test set forth in *In re Leichter,* 197 F. 2d 956, cert. den. 344 U. S. 914, in which it was held that the evidence must disclose that the failure to preserve records made it impossible to determine bankrupts financial condition and material business transactions; and we believe that objector did not and totally failed to prove facts to establish a *prima facie* case herein. Such case also sets forth the general rule that the right to a discharge in bankruptcy is statutory, and the provisions of the Bankruptcy Act which specify when discharge shall be granted must be strictly against the objector and liberally in favor of bankrupt.

It is also contended that there is no evidence whatsoever to support the Findings, Conclusions and Orders in that the specifications [Tr. pp. 21-22] set forth in particularity the defects claimed and that no proof was made of such particular items alleged.

The hearing is limited to the specifications filed.

In re Green, 53 Fed. Supp. 886;
In re De Cillis, 83 Fed. Supp. 802.

Mere admission of evidence not pleaded is not enough for amendment no motion being made to conform the pleading to the proof.

In re Deutsch, 36 A. B. R. (N. S.) 316.

Failure to Explain Deficiency of Assets.

Sec. 14-C, subd. 7, of the Bankruptcy Act provides:

"C. The Court shall grant the discharge unless satisfied that the bankrupt has . . .

"7. has failed to explain satisfactorily any losses of assets or deficiencies of assets to meet his liabilities. . . ."

We submit that no evidence whatsoever was introduced by objector on this ground. Counsel for Trustee in his opening statement [Tr. pp. 164-169] stated: "I would like to refresh your Honor's memory briefly . . ." [Tr. p. 164], and he then proceeded to read from a transcript of 21-A examination of Frederick M. Rameson and William W. Rameson. This transcript or testimony was not offered into evidence. Although it is conceded that the testimony of either of the individuals on such 21-A examination could have been entered into evidence, if desired, as to the specific individual or as to the partnership, a bankrupt's general examination is not to be

considered as in evidence unless actually introduced or stipulated into the record. (See *Remington on Bankruptcy,* (6th Ed.), Vol. 7, p. 365, and *Collier on Bankruptcy,* Vol. 1, p. 1289, and cases cited therein.)

If it be assumed that such testimony on 21-A examination should be considered evidence, even though not introduced, then it would be only just and proper to consider the surrounding questions and answers at such time. As recited by counsel for Trustee [Tr. p. 164] the Referee asked Frederick M. Rameson on 21-A examination [Tr. p. 111] that assuming he had lost $100,000, how did he account for having lost that much. However, on 21-A examination [Tr. p. 111] and immediately prior thereto counsel for Trustee stated: "How do you account for this thing happening? In other words, what was wrong with the operation of the business that brought about this serious condition in less than three years?" The bankrupt witness could only consider the word "account" as used in the questions as asking why the firm lost money, and not what happened to the money. Wrongful conduct, not ignorance, must be what Congress intended to penalize by denial of discharge. *In re West,* 158 F. 2d 858, held that the discharge provisions of the Bankruptcy Act must be liberally construed in favor of a bankrupt who has no intent to violate such provisions. Also see, *Albina v. Kuhn,* 149 F. 2d 108, *Roberts v. W. P. Ford & Son,* 169 F. 2d 151. *In re Louich,* 117 F. 2d 612, held that a discharge is a privilege accorded to bankrupts by the Bankruptcy Act unless they are chargeable with conduct showing some lack of personal business morality. *In re Rinker,* 107 Fed. Supp. 261, held that the rights of an honest bankrupt to a discharge from his debts is to be jealously protected. *In re Newman,* 126 F. 2d 336, held

the right to discharge in bankruptcy should be liberally construed. Cases holding a denial of discharge under this ground uniformly find that the bankrupt cannot explain what became of money, or that he prior to bankruptcy had certain assets which he no longer had at bankruptcy and could not explain the deficiency, as discussed *In re Horowitz,* 92 F. 2d 632.

It is significant that the objector does not attempt to claim or prove that any assets disappeared.

It is also significant that even though bankrupts did not know why they became bankrupt, that trustee did ascertain such from the books and records of the business, as counsel for Trustee stated in his opening argument that it took a lot of work and a lot of time to find out the true condition of the business [Tr. p. 166] and that from their examination they had determined what the costs were and that they were running far in excess of what they were contracting to do the jobs for. [Tr. p. 167.]

It is significant that after many continuances of time in which to object to discharge, all based on needing further time to examine into acts of bankrupt relative to filing objections, trustee could allege no more than a technical claim that Frederick M. Rameson stated in effect on 21-A examination that he did not know why the business lost money.

The record supports no suspicious circumstances as might establish a *prima facie* case so as to put the bankrupt to proof. See *Remington on Bankruptcy,* 6th edition, Vol. 7, page 356, and cases cited. The objector after extended examination into the business affairs failed to specify or prove any specific loss or deficiency that could not be explained by referring to the books and records of the business.

It should also be noted that the only possible inference that William W. Rameson stated, as claimed as the basis for objection in the specification filed, that he could not account for why the business lost money is that on being questions as to whether his testimony would be approximately the same as Fred, he answered "That is correct." [Tr. p. 167.] *Dilworth v. Boothe,* 69 F. 2d 621, held "The reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural."

IV.

Did the Specifications of Objections State Facts Sufficient to Constitute a Ground of Objection to Discharge.

Books and Records.

It was necessary as done for objector to allege in particularity any failure to properly maintain the books and records as the failure charged was not an absolute failure to keep books or records whatsoever. *Remington on Bankruptcy,* 6th Edition, Vol. 7, page 326, and cases therein cited.

The allegations tend to allege a possible basis for a nondischargeable debt, but such would not be a proper inquiry in a discharge matter.

In re Lowe, 36 Fed. Supp. 772.

Failure to Explain Loss or Deficiency.

It was necessary as done for objector to allege in particularity the grounds hereunder so as to appraise the bankrupt of what he had to meet.

In re Goldstein, 20 Fed. Supp. 403;

In re Karp, 11 Fed. Supp. 129.

The specific allegations allege that bankrupt stated he could not account for why the business suffered serious financial losses. As previously discussed, it is submitted that the statute is not concerned with the reasons for loss, but rather what became of assets which the bankrupt had had and did not have at the time of bankruptcy.

V.

Should the Judge Have Made Findings of Fact and Conclusions of Law.

In *Perry v. Bauman,* C. A. Cal., 122 F. 2d 409, at 410, it was held that following Rule 52 (a) of the Rules of Civil Procedure the Court must find facts specially and state separately its conclusions of law thereon. In these matters the Court made no findings, nor conclusions. The Referee so did, however, the findings of the Referee did not fully consider the allegations made in the Specifications to Objection to Discharge, and therefore there is a lack of findings on material issues.

In *Moonblatt v. Kosin,* 139 F. 2d 412 at page 415, it was held:

> "General Order No. 47 requires the District Judge to adopt the master's report, to modify it, or supplement or reject it. Implicit in the General Order is the requirement that the District Judge pass upon the referee's findings of fact, adopt or modify them, or if necessary, make findings of his own."

Conclusion.

We submit that from the facts and the law the order involved in this consolidated appeal, and each of them, and likewise the orders of the Referee approved and confirmed by the Court are, and each of them is, erroneous for the reasons herein discussed. We do not believe that the objectors put forth any real evidence of such a nature as Congress would have intended to penalize by denial of discharge, leaving the young men concerned herein forever saddled with oppressive debts. We believe that denial of discharge on the evidence and record herein presented is contrary to the spirit and intent of *Local Loan Co. v. Hunt,* 292 U. S. 234. We believe that there has been such compilation of errors that the bankrupts did not truly know what was expected of them in order to gain the relief of debts through a discharge in bankruptcy.

Respectfully submitted,

Paul Taylor,
David Sosson,
Kyle Z. Grainger,
Attorneys for Appellants.